Amalgamated Transit Union, Local 689 *and* Tamar C. Simmons. Case 05–CA–141077

December 1, 2015

DECISION AND ORDER

BY CHAIRMAN PEARCE AND MEMBERS HIROZAWA AND MCFERRAN

On August 25, 2015, Administrative Law Judge Arthur J. Amchan issued the attached decision. The Respondent filed exceptions with supporting argument, and the General Counsel filed an answering brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions and to adopt the recommended Order as modified and set forth in full below.[2]

[1] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

There are no exceptions to the judge's findings that the Respondent violated the Act by issuing two disciplinary warnings to Tamar Simmons, by instructing her not to talk to fellow employees about breaktimes, and by implicitly threatening to discharge her.

In adopting the judge's finding that the Respondent violated Sec. 8(a)(3) and (1) by issuing employee Tamar Simmons an unfavorable performance appraisal, we note that the *Wright Line* standard does not require the General Counsel to show "particularized motivating animus toward the employee's own protected activity or to further demonstrate some additional, undefined `nexus' between the employee's protected activity and the adverse action." *Libertyville Toyota,* 360 NLRB No. 141, slip op. at 4 fn. 10 (2014), enfd. 801 F.3d 767 (7th Cir. 2015). See, e.g. *Mesker Door, Inc.*, 357 NLRB No. 59, slip op. at 2 fn. 5 (2011). We therefore do not rely on the judge's citation to *American Gardens Management Co*., 338 NLRB 644 (2002).

In finding that the General Counsel met his initial burden of establishing that animus toward Simmons' protected activity was a motivating factor for her negative performance appraisal, the judge relied on the lack of any evidence that Simmons' performance was inadequate between 2010 and 2014. We agree with the judge's finding, but further find that the Respondent's animus is demonstrated by the additional unfair labor practices found by the judge, to which there are no exceptions. Finally, we also do not rely on the judge's statements concerning the activities of Gerry Garnett.

[2] We shall modify the judge's recommended Order to conform to his unfair labor practice findings, and we shall substitute a new notice to conform to the Order as modified.

ORDER

The National Labor Relations Board orders that the Respondent, Amalgamated Transit Union, Local 689, Forestville, Maryland, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Instructing employees to stop discussing their terms and conditions of employment with other employees.

(b) Implicitly threatening employees with discharge if they engage in protected activities, including the filing of grievances.

(c) Issuing disciplinary warnings to employees because of their union or other protected activities, including the filing of grievances.

(d) Issuing negative performance evaluations to employees because of their union or other protected activities, including the filing of grievances.

(e) In any like or related manner interfering with, restraining, or coercing its employees in the exercise of their rights under Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days from the date of the Board's Order, remove from its files any reference to the unlawful disciplinary warnings and negative performance review issued to Tamar Simmons, and within 3 days thereafter notify her in writing that this has been done and the warnings and performance review will not be used against her in any way.

(b) Within 14 days after service by the Region, post at its Forestville, Maryland facility copies of the attached notice marked "Appendix."[3] Copies of the notice, on forms provided by the Regional Director for Region 5, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, the notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in

[3] If this Order is enforced by a judgment of the United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since September 12, 2014.

(c) Within 21 days after service by the Region, file with the Regional Director for Region 5 a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C. December 1, 2015

Mark Gaston Pearce, Chairman

Kent Y. Hirozawa, Member

Lauren McFerran, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT instruct you to stop discussing terms and conditions of employment with other employees.

WE WILL NOT implicitly threaten you with discharge if you engage in union or other protected activities.

WE WILL NOT issue disciplinary warnings to you because of your union or other protected activities.

WE WILL NOT issue negative performance evaluations to you because of your union or other protected activities.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights listed above.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to the unlawful warnings and the unlawful negative performance evaluation issued to Tamar Simmons, and WE WILL, within 3 days thereafter, notify her in writing that this has been done and that the warnings and negative performance evaluation will not be used against her in any way.

AMALGAMATED TRANSIT UNION, LOCAL 689

The Board's decision can be found at www.nlrb.gov/case/05-CA-141077 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273-1940.

Katrina H. Ksander, Esq., for the General Counsel.
Douglas Taylor, Esq. (Gromfine, Taylor & Tyler, P.C.), of Alexandria, Virginia, for the Respondent.

DECISION

STATEMENT OF THE CASE

ARTHUR J. AMCHAN, Administrative Law Judge. This case was tried in Washington, D.C., on July 9, 2015. Tamara C. Simmons filed the charge initiating this case on November 17, 2014. The General Counsel issued the complaint on March 25, 2015. The General Counsel alleges the Respondent, by its president and business agent, Jackie Jeter, violated Section 8(a)(1) by coercively instructing Tamar Simmons not to speak with fellow employees or shop stewards about working conditions and implicitly threatening her with discharge because she caused the Union to file grievances on her behalf.

The General Counsel also alleges that Respondent violated Section 8(a)((3) and (1) by issuing 2 warnings to Tamar Simmons and discriminatorily issuing her a negative performance evaluation. Respondent discharged Simmons in November 2014. However, her discharge is before an arbitrator and is not before me.

On the entire record, including my observation of the demeanor of the witnesses,[1] and after considering the briefs filed by the General Counsel and Respondent, I make the following

FINDINGS OF FACT

I. JURISDICTION

Respondent, the Amalgamated Transit Union, Local 689 is a labor organization representing employees in the transportation industry, including employees of the Washington Metropolitan Transit Authority (WMATA). Respondent employs employees, such as office staff and collected dues and initiation fees during 2014 in excess of $500,000. Also in 2014, Respondent remitted more than $5000 to the Washington D.C. office of the International Union from its main office in Forestville, Maryland. Respondent admits, and I find, that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that the Union representing its office administrative assistants, the Office Professional Employees Union, Local 2, is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

Tamar Simmons began working for Respondent as an administrative assistant in 2010. Prior to September 2014, Respondent had given Simmons only 1 performance review. That was done about the time of her 90th day of employment in 2010. Simmons filed a grievance in 2013 that was the subject of an arbitrator's stipulated award in April 2014 (GC Exh. 9). That award provided that: (1) directives from the president/business agent of Local 689 were not to be modified or countermanded by other ATU officials; (2) discipline of Local 2 members was to be conducted privately, with an opportunity for a Local 2 official to attend; (3) verbal directives to alert the President/Business agent to time limit concerns of a grievance were to be put in writing and inserted into office procedure; (4) a written warning issued to Simmons was to be reduced to a first verbal caution and removed from Simmons' file and, (5) the award was without determination or prejudice to the respective positions of any of the parties.[2]

On about September 8, 2014, Jackie Jeter, president and business agent of Local 689 held a staff meeting for the Union's office employees. At that meeting she announced that a number of tasks were no longer to be performed by Tamar Simmons, so that Ms. Simmons could concentrate on answering the telephones. Among those tasks were logging in grievances, handling incoming mail and keeping a huge bulletin board current. Some of the work performed by Simmons prior to September 8, was to be performed by David Stephens, Respondent's communications director, who Respondent hired in June and Katherine Crawford, manager of records, who had worked for Respondent for a number of years. Neither is a member of the OPEIU Local 2 bargaining unit. In the President's office, Local 2's unit consisted of two employees; Simmons and Shop Steward Debra Sanders.[3]

Office and Professional Employees Local Union 2 filed a grievance alleging a contractual violation in the transfer of Simmons' work to nonunit personnel on September 11. While Local 689 President Jeter did not see the grievance on September 11, on that date she was aware that it was being filed.

On September 12, at a step 1 grievance meeting, Jeter asked Simmons why she filed a grievance. Simmons replied that Jeter had given her work to non-bargaining unit employees. Jeter responded that it was not Simmons' work; that Crawford had performed these tasks before Simmons was hired. The Union ultimately dropped Simmons' grievance.

Shortly after the step 1 meeting, Jeter interrogated Simmons as to when she took her break. When Simmons went to Debra Sanders to discuss their break times, Jeter got very angry at Simmons. Jeter told Simmons not to talk to Sanders about the break and complained that every time Jeter addressed Simmons, Simmons filed a grievance. Jeter suggested that if Simmons was unhappy at Respondent, she should quit.

Later that day, September 12, after a 10–15 minute meeting in Jeter's office, Jeter gave Simmons a warning letter for being argumentative and aggressive in her tone whenever questioned about her work (GC Exh. 4). The next day, Jeter sent Simmons an email chastising her for not keeping the main ATU bulletin board up to date. Jeter stated that nothing had been updated or changed in what appeared to be over a year (GC Exh. 6).

On September 16, Jeter met with Simmons and gave her a performance review (GC Exh. 7). This was the first performance review Simmons had received since 2010.[4] Jeter rated Simmons on a scale 1–5 in 29 job tasks. She gave Simmons a 1, the worst rating, in 20 of the 29 categories. During her meeting with Simmons, Jeter changed several ratings to a significantly more favorable evaluation. For example Jeter changed Simmons' rating for being productive from a 1 to a 3.

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[1] Only two witnesses testified in this case, Simmons and Jeter. Jeter did not contradict Simmons' testimony on any material point. Therefore, I credit Simmons.

[2] Simmons is romantically involved with Gerry Garnett, second vice president of Local 689. Garnett is running for president of Local 689, the position currently held by Jeter. Respondent's brief states at p. 3 that Garnett was removed from his position of assistant business agent in 2014. There is no evidence of this removal in the record. Respondent's brief seems to suggest that Simmons 2013 grievance is connected to her relationship with Garnett. The record is silent on this as well.

It is black letter law that discrimination predicated on the protected activity of others, such as family members, is as much a violation of the Act as discrimination against the employee who engaged in union or other protected activity, *Golub Bros. Concessions*, 140 NLRB 120 (1962); *Tolly's Market, Inc.,* 183 NLRB 379 fn. 1 (1970); *PJAX,* 307 NLRB 1201, 1203-1205 (1992), enfd. 993 F.2d 378 (3d Cir. 1993). However, the General Counsel did not litigate the instant case on the theory that Jeter was retaliating against Simons for the dissident union activity of Garnett. However the fact that there were no adverse actions against Simmons until 2013 and the fall of 2014 certainly suggests a nexus between Jeter's issues with Garnett and her issues with Simmons.

[3] In June 2014, Respondent also hired Katie Traber as an assistant to the president.

[4] Jeter gave other employees a performance review at about the same time. I find this has no bearing on the outcome of this case.

Respondent discharged Simmons on about November 5, 2015. There is no evidence in this record as to what led to the discharge and no evidence generally as to what transpired between mid-September and November 5.

ANALYSIS

Respondent, by Jackie Jeter, violated in Section 8(a)(1)by telling Tara Simmons that if he was unhappy working for Respondent, she should quit.

It is black letter Board law that an employer violates Section 8(a)(1), when in response to protected activity, the employer tells an employee that he or she should quit or look for another job. Such statements in this context are an implied threat that the employee may be discharged for such activity in the future, *Meeker Door, Inc*., 357 NLRB No. 59 (2011); *Paper Mart*, 319 NLRB 9 (1995); *Jupiter Medical Center*, 346 NLRB 650 (2006). Thus, Jeter's statement to Simmons, which was precipitated by the filing of Simmons' grievance(s), that "if you don't like it here, you can leave," is a clear violation of Section 8(a)(1). The coercive nature of this remark was exacerbated by Jeter's subsequent observation that, "it's either going to be me or you, because I'm not leaving."[5]

Respondent, by Jeter, violated Section 8(a)(3) and (1) by giving Simmons a bad performance review, issuing her the September 12 warning and sending her the September 13 email chastising Simmons for inadequate upkeep of the ATU bulletin board.

In order to establish a violation of Section 8(a)(3) and (1), the Board generally requires the General Counsel to make an initial showing sufficient to support an inference that the alleged discriminatee's protected conduct was a 'motivating factor' in the employer's decision. Then the burden shifts to the employer to demonstrate that the same action would have taken place even in the absence of protected conduct, *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 889 (lst Cir. 1981), cert. denied 455 U.S. 989 (1982), approved in *NLRB v. Transportation Management Corp*., 462 U.S. 393, 399-403 (1983); *American Gardens Management Co*., 338 NLRB 644 (2002). Unlawful motivation and animus are often established by indirect or circumstantial evidence.

In order to make a sufficient initial showing of discrimination, the General Counsel must generally make an initial showing that (1) the employee was engaged in protected activity; (2) the employer was aware of the activity; and (3) that animus towards the protected activity was a substantial or motivating reason for the employer's action.

In this case there is no question but that Simmons engaged in protected activity, filing a grievance over the change in her duties, and that Respondent of aware of this. Thus, the issue with regard to the performance review that Jeter gave to Simmons, the warning and the reprimand, is whether they were motivated in whole or in part by Simmons' protected activities in filing a grievance. Since Simmons had worked since 2010 without a performance review and there is absolutely no evidence that her job performance was inadequate between 2010 and 2014, I find that the bad performance review was motivated by Simmons' protected activities (and maybe Garrett's as well).[6]

The same is true for the email reprimanding Simmons for failing to keep the bulletin board current. Jeter's allegation that the bulletin board had not been updated for over a year is compelling evidence of discriminatory motive. If that assertion is true, then it establishes that upkeep of the bulletin board was never an issue for Jeter until Simmons filed the September 2014 grievance. The timing of this reprimand establishes its retaliatory nature in the absence of any persuasive alternative. Jeter's testimony that she did not notice the condition of the bulletin board until September 2014 is unpersuasive. Even assuming that was true, it indicates that Jeter was scrutinizing Simmons' job performance more closely as a means of retaliation for her protected activity.

Likewise, Jeter's warning to Simmons for being constantly argumentative violated Section 8(a)(3) and (1). The evidence of record, to the extent that it establishes that Simmons was argumentative, establishes that the subjects of the arguments were either (1) the alleged transfer of her bargaining unit work to non-unit employees, or (2) the timing of her break. In either case, they involved the terms and conditions of her employment.[7] There is no evidence on which to find that Simmons sacrificed the protections of the Act by her conduct, pursuant to the criteria set forth in *Atlantic Steel Co*., 245 NLRB 814 (1979).

Respondent violated Section 8(a)(1) in telling Simmons not to talk to Debra Sanders about the change in her duties or her breaktimes

As a general proposition an employer violates Section 8(a)(1) when it forbids employees to discuss working conditions or union matters with other employees, when it does not prohibit the discussion of nonwork-related matters while on duty. Since there is no evidence that Respondent prohibited the discussion of nonwork-related matters, Jeter's statements to Simmons not to talk to Sanders about their respective break times, violates the Act on this basis alone.

I am not sure that the cases cited by the General Counsel are relevant to this case, since the record suggests that Simmons went to speak with Sanders on worktime, not breaktime.

CONCLUSIONS OF LAW

Respondent violated Section 8(a)(1) of the Act in coercively instructing Tamar Simmons not to talk to fellow employees about their break times and implicitly threatening to discharge her for causing Local 2, Office Professional Employees Union Local 2 to file a grievance on her behalf.

[5] Although the transcript does not read this way, it is likely that Jeter said something to the effect that it is going to be either me or you, and it's going to be you, because I am not leaving. Jeter did not contradict Simmons as to the essence of this conversation.

[6] In the absence of any documentation, I decline to credit Jeter's self-serving testimony regarding Simmons' job performance.

[7] Employee breaks are a term and condition of employment and indeed are a mandatory subject of bargaining, *Rangaire Co.,* 309 NLRB 1043 (1992).

Respondent violated Section 8(a)(3) and (1) by issuing two disciplinary warnings to Tamar Simmons and giving her a very unfavorable performance appraisal.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[8]

ORDER

Respondent, Amalgamated Transit Union, Local 689, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Instructing employees not to discuss their terms and conditions of employment with other employees.

(b) Implicitly threatening employees with discharge for engaging in protected activities, including the filing of grievances.

(c) Discharging or otherwise discriminating against any of its employees for engaging in and/or planning to engage in protected concerted activities, including the filing of grievances.

(d) In any like or related manner interfering with, restraining, or coercing its employees in the exercise of their rights under Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days from the date of the Board's Order, remove from its files any reference to the unlawful disciplinary warnings/reprimands issued to Tamar Simmons and the poor performance review given to Tamar Simmons, and within 3 days thereafter notify her in writing that this has been done and the warnings/reprimand and performance review will not be used against her in any way.

(b) Within 14 days after service by the Region, post at its Forestville, Maryland facility copies of the attached notice marked "Appendix."[9] Copies of the notice, on forms provided by the Regional Director for Region 5, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, the notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since September 12, 2014.

(c) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C., August 25, 2015

APPENDIX

NOTICE TO EMPLOYEES
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The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

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Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT threaten you with discharge or discipline for engaging in protected activity.

WE WILL NOT prohibit you for discussing with other employees the terms and conditions of your employment.

WE WILL NOT discharge, discipline, or otherwise discriminate against any of you for engaging in or planning to engage in protected concerted activity, including seeking to have grievances filed on your behalf.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, within 14 days from the date of this Order, remove from our files any reference to the unlawful disciplinary warnings/reprimands issued to Tamar Simmons and her poor performance review, and WE WILL, within 3 days thereafter, notify her in writing that this has been done and that the warnings/reprimands and performance review will not be used against her in any way.

AMALGAMATED TRANSIT UNION, LOCAL 689

The Administrative Law Judge's decision can be found at www.nlrb.gov/case/05-CA-141077 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273-1940.

[8] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[9] If this Order is enforced by a judgment of the United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."